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ARBITRATOR'S AUTHORITY

Taking a grievance to arbitration can be a stressful. Sometimes you get a decision where both parties are scratching their head saying, where the heck did that come from?! So you run to your HR Advisor, demanding that the decision be appealed.

It's my unhappy task to let you know appealing the decision is not always possible. Arbitrators get their authority to make binding decisions from the Negotiated Agreement itself. But when do arbitrators exceed their authority?

Section 7122 of the Federal Labor Management Statute allows either party (the Union or Management) to file exceptions to the award of an arbitrator with the Federal Labor Relations Authority (FLRA). The law makes it clear, however, that the FLRA may not overturn an award simply because it might have reached a different conclusion. But when may it determine the arbitrator went too far?

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QUIZ TIME

You hired Tommy, the temporary Template Tracer, six months ago. After putting up with his unacceptable performance (in six months you had to trash all but two template tracings), his unacceptable attendance (he was absent every Friday and half the Mondays), his terrible temper tantrums (at least once a week), and his just generally "being in your face" every day, you finally terminate his temporary tenure. You are terribly tickled!

Six weeks later, Tammy, your terrific HRO advisor, calls and informs you that Tommy has appealed the State's determination to deny him unemployment compensation benefits. Tammy wants you to testify on Tuesday at Tommy's appeal hearing.

You tell Tammy that (1) Tommy's a twit, (2) you never want to see Tommy again, and (3) if the state wants to waste its money granting Tommy benefits, that's the state's problem, not yours. And furthermore, you're not going to waste your time at Tommy's tribunal Tuesday.

Think you made the right decision? Take a look at our article "Tommy the Temporary Template Tracer."

INVESTIGATE

Prior to initiating any disciplinary action, supervisors should conduct a thorough preaction investigation.

"Why?" you ask, "I already know what he did." The answer is simple. The employee has a right to appeal. And if the employee does appeal, regardless of which appeal forum is used, management has the burden of proving that the employee was guilty of the infraction. The employee does not have to prove he was not guilty. The burden is on you to prove that he was.

How do you do that? By putting more evidence of guilt before the judge than he does of his innocence. The standard is a *preponderance of evidence*. How do you get that evidence? By conducting a thorough investigation. As part of that investigation, you're going to gather that evidence.

How do you know what evidence you'll need? Call you Human Resources Office for assistance. They're skilled in such matters.

Once you've gotten the evidence, what do you do with it? Hang on to it. You're going to need to produce it at the appeal hearing which may be months or in some cases years away. And if you can't produce it, the disciplinary action you imposed will be reversed

Happy Holidays
From all of us
at HRSC-NW

TOMMY THE TEMPORARY TEMPLATE TRACER

Employees whose services are terminated are eligible to receive unemployment compensation benefits unless the reasons for their termination are such as to disqualify them.

As a general rule, employees who voluntarily resign their employment, or who are terminated for misconduct are ineligible to receive benefits. But these are not hard and fast rules. Each case is considered individually by an examiner who is employed by the Washington State Employment Security Department (WSESD).

When a former employee applies to WSESD for unemployment benefits, the examiner will contact the activity to determine the reason(s) for the employee's termination. Based upon information contained in the employee's application and the information provided by the activity, the examiner will determine whether or not benefits will be granted.

Once WSESD has made a determination to grant or deny benefits, either party may appeal the determination. If an appeal is filed an Administrative Law Judge will convene a hearing, either telephonically or in person. At such hearings, an HRO advisor represents the activity. One or more supervisors or managers may appear as witnesses for the activity. The activity bears the burden of proving the employee was terminated for reasons disqualifying him or her for unemployment compensation benefits, or benefits will be granted.

So, why do we spend time (and thus money) to process these appeals? Should we really care whether or not a terminated employee gets unemployment compensation benefits from the State of Washington? Quite simply, the answer is yes; we should and do care

Private employers contribute, as a normal cost of business, to an insurance fund from which unemployment compensation benefits are paid. If the State grants benefits to a former employee based upon their employment in private industry, the benefits are normally paid from that insurance fund.

Neither the Navy nor any other federal agency contributes to that fund. The federal government

self-insures. If the State grants unemployment benefits to a former employee based upon federal employment, the State writes the check to the former employee but then bills the federal government for the amount of the benefit paid. Thus each federal agency pays any unemployment benefits granted by the State if such benefits were derived from the former employee's employment in that agency.

So, long story short, if a former Navy employee is granted unemployment benefits by the state, the Department of the Navy will ultimately pay those benefits. Dollars spent for erroneous unemployment compensation benefits simply means that the Navy has that many less dollars to spend elsewhere.

Back to Tommy. Should you refuse to testify at the hearing and Tammy is thus unable to prove that Tommy was guilty of unacceptable performance, unacceptable attendance, too many temper tantrums, and otherwise "getting in your face," Tommy will be granted unemployment benefits.

Did you make the right decision? You decide. I wonder what the Secretary of Navy would say.

Got Ideas? You can contact us at nwlabor_nw@nw.hroc.navy.mil. We would enjoy hearing your ideas for our newsletter.

ARBITRATOR'S AUTHORITY

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Typically, the FLRA reverses awards under subsection (a)(1), when the decision is contrary to law, rule or regulation. But subsection (a)(2) allows the FLRA to overturn an award "on other grounds similar to those applied by federal courts in private sector labor-management relations cases."

In 1980, in Federal Aviation Science and Technological Association, 2 FLRA No. 85, the FLRA referred to Supreme Court rulings and declared it would not review arbitrators' credibility determinations, the weight given to witness' testimony, factual findings or the construction and application of the collective bargaining agreement.

So what are the "other grounds" for overturning an award? The FLRA has boiled them down to these:

- The award fails to draw its essence from the agreement.
- The award is based on a non-fact.
- The arbitrator exceeded his or her authority.
- The award runs counter to public policy.
- The arbitrator was biased or dishonest.

The FLRA has ruled that arbitrators exceed their authority when they:

- Fail to resolve an issue submitted to arbitration.
- Resolve an issue not submitted to arbitration.
- Disregard specific limitations on their authority.
- Award relief to individuals not encompassed within the grievance.

The parties are at risk when they fail to stipulate to the issue that they want an arbitrator to resolve. Arbitrators may adopt an issue statement submitted by one of the parties or they are free to frame the issue as they see it.

This doesn't mean that an arbitrator can frame an issue and then order a remedy that is beyond the scope of the framed issue.

The FLRA does give deference to an arbitrator's decision on remedy. An arbitrator can extend an award to issues that necessarily arise from the central issue that brought the parties to arbitration.

But arbitrators exceed their authority when they extend their awards to employees other than the grievants. In INS, 15 FLRA No. 106, the parties

stipulated the issue was whether the agency improperly denied official time to a union representative. The arbitrator found in the union's favor, and followed the union's request that relief be extended to employees "similarly situated" to the grievant. The FLRA ruled the arbitrator could not use the stipulated issue to transform the proceeding into a "sort of a class action."

The FLRA ruled along the same lines in a similar arbitration. In that case, the arbitrator threw out a suspension, finding it was motivated solely by anti-union animus. In addition to making the grievant whole, the arbitrator ordered the agency to cease its harassment of all union officials. The FLRA said "too far" and found this decision flawed.

Unfair Labor Practice

Did you ever discuss an employee's grievance with the employee without their union representative present? If so, you're probably guilty of an unfair labor practice.

"WHAT!," you say, "I thought the idea was to resolve employee complaints at the lowest possible level. If the employee wants to discuss the grievance with me, and doesn't want, or doesn't ask for the union to be there, why do I have to invite them?"

The Labor Management Relations Statute provides the union with the right to be present at any formal discussion between supervisors and bargaining unit employees. Once an employee has filed a grievance, any subsequent discussions concerning that grievance are "formal discussions" as defined by the Statute.

It's an easy trap to fall into. You're sitting at your desk one day and your employee enters and begins to discuss a work problem. Before you know it, the subject has shifted to the grievance the employee has filed two days before. If the employee brings the subject up and doesn't request a union steward (or even tells you he/she doesn't want the union there), why can't you continue the discussion? The answer is simple. Under the Statute, the right to be represented at the discussion is the union's right, not the employees. If you continue the discussion without inviting the union, you have violated the union's right and by so doing, have committed an unfair labor practice.

Other Helpful Resources

Past Issues of Labor News and Views www.bangor.navy.mil/subase/hro/HRSC/News.htm
Looking for your HRO? www.bangor.navy.mil/subase/hro/general/index.html
General Labor Relations information: www.donhr.navy.mil/managers/dealing_with_unions.asp
Training information: www.donhr.navy.mil/Employees/training.asp